Federal Cigarette Labeling and Advertising Act

Breaking Down Statutory Text

This chart details which preemption sections of various omnibus and sectoral statutes deal with federal preemption.

Codified Section	Type of Preemption	Are the circuit courts in general agreement on what this means?
15 U.S.C. § 1334(a)-(b)	Ceiling Preemption	Yes – *Cipollone, Lorillard, Altria Group*
15 U.S.C. § 1334(c)	Anti-Preemption Provision	Yes – *Cipollone, Lorillard, Altria Group*

Methodology

The statutory text overwhelmingly contains express preemption and various savings clauses. Express preemption is directly related to statutory text, and it is the only form of preemption with this quality. The remaining types of preemption – field, impossibility, and obstacle – are forms of *implied* preemption. As the name suggests, these preemption categories are implicit in every statute and consequently do not rely on statutory text. (However, sometimes a statute will explicitly address an implied preemption principle, such as 42 U.S.C. § 2000h-4.) Instead, implied preemption principles appear exclusively in case law. Case law that relies on a theory of implied preemption are appropriately notated.

Since courts have not addressed every issue, there may be areas that are marked as "Not litigated."

Legend:

Express Preemption
Field Preemption
Impossibility Preemption
Obstacle Preemption
Floor Preemption

Anti-Preemption Provision
Compliance Savings Clause
Remedies Savings Clause
Sunset Provision
Ceiling Preemption

Statutory Text

15 U.S.C. §1334

(a)Additional statements

Except to the extent the Secretary requires additional or different statements on any cigarette package by a regulation, by an order, by a standard, by an authorization to market a product, or by a condition of marketing a product, pursuant to the Family Smoking Prevention and Tobacco Control Act (and the amendments made by that Act), or as required under section 387c(a)(2) of title 21 or section 387t(a) of title 21, no statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b)State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

(c)Exception

Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the Family Smoking Prevention and Tobacco Control Act, imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.

Summary

Three Supreme Court cases have addressed the preemptive effect of the FCLAA. Under *Cipollone*, §1334(b) expressly preempts a state law claim when "the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking or health . . . imposed under State law with respect to advertising or promotion." Many circuit courts have considered whether the FCLAA preempts state regulations or common law claims, and there has not been significant discrepancies between their interpretations.

Case Law

Cipollone v. Liggett Group, 505 U.S. 504 (1992)

Facts: Rose Cipollone died of lung cancer in 1984 after smoking since 1942. Her son alleges respondents are responsible for her death under theories of breach of express warrantied, failure to warn, fraudulent misrepresentation, and conspiracy. Respondents argue the FCLAA preempts any liability after its enactment in 1965.

Rule: Section 5(b) of the 1969 FCLAA preempts state-law obligations "with respect to the advertising or promotion" of cigarettes.

Application: The 1965 FCLAA only preempted state and federal rulemaking bodies from mandating particular cautionary statements; it did not preempt state law damages actions. However, the 1969 FCLAA has a broader preemptive reach; it preempts positive enactments and common-law claims "with respect to the advertising or promotion" of cigarettes. The Court addresses each state law claim, in turn, to determine if the claim is "with respect to" cigarette advertising or promotion.

Holding: The 1969 FCLAA preempts failure-to-warn claims that would require additional or clearer warnings. However, failure-to-warn claims based on testing or research practices are not preempted. The 1969 FCLAA did not preempt claims for express warranty, fraud, misrepresentation, or conspiracy.

New Test: If §1334(b) expressly preempts a claim depends on "whether the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking or health . . . imposed under State law with respect to advertising or promotion."

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)

Facts: In 1999, the Massachusetts Attorney General created regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. Cigarette petitioners argued that the FCLAA preempts the Massachusetts regulations. However, the FCLAA does not cover smokeless tobacco and cigars.

Holding: The FCLAA preempts state regulations targeting cigarette advertising. It does not apply to regulations on smokeless tobacco and cigars.

Good v. Altria Group, Inc., 555 U.S. 70 (2008)

Facts: Plaintiffs, smokers of Marlboro Lights for at least 15 years, sued Phillip Morris under theories of unfair and deceptive practices in marketing Marlboro Lights.

Rule: The ultimate touchstone of preemption is Congressional intent. However, when regulating in the historic police powers of the States, the presumption against preemption applies.

Application: The states purpose of the FCLAA, 15 U.S.C. § 1331, is to 1) adequately inform the public of the hazards to health of cigarette smoking and 2) protect commerce and the national economy by nonuniform and confusing cigarette labeling and advertising requirements.

Holding: The claims are not preempted by the FCLAA. The phrase "based on smoking and health" should be construed narrowly, not preempting the general duty not to make fraudulent statements.

Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987)

Facts: Palmer died of lung cancer after smoking 3-4 packs of cigarettes daily.

Holding: The suit under a theory of inadequate warning, when the warning complies with the FCLAA, is preempted.

13-34 94th St. Grocery Corp. v. New York City Bd. of Health, 685 F.3d 174 (2d Cir. 2012)

Facts: The Board of Health of the City of New York adopted a resolution regarding display signs in stores that sell tobacco.

Holding: The resolution is preempted by the FCLAA.

Federation of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633 (7th Cir. 1999)

Facts: A Chicago ordinance restricts all publicly visible advertising of cigarette and alcohol products, with exemptions. The Seventh Circuit sees the ordinance as a land-use regulation.

Application: The court reads the ordinance considering the presumption against preemption and the congressional desire for uniformity of regulation.

Holding: When the ordinance regulates solely the content of advertising, without considering land-use, it is preempted. The remainder of the statute that regulates land-use is severable and saved from preemption.

Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001)

Facts: Iowa's Tobacco Use Prevention and Control Act prohibits giving away free tobacco products or other free goods with tobacco products. Retailers in Iowa contend the act is preempted by the FCLAA.
Rule: The FCLAA preempts "(1) state regulations (2) based on smoking and health (3) concerning the advertising or promotion (4) of cigarettes (5) whose labels comply with the FCLAA."
Application: The third element "concerning the advertising or promotion," is at issue here. The activities of the Control Act are considered promotions.
Holding: The Control Act, where it regulates cigarette promotions, is preempted. The remainder of the Control Act is not preempted.

Lindsey v. Tacoma-Pierce County Health Dep't, 195 F.3d 1065 (9th Cir. 2000)
Facts: The Tacoma-Piecrce County Health Department Board of Health banned outdoor tobacco advertising within a county unless it fit the "tombstone exception." Under the exception, outdoor advertisement must be "plain black type on a white field without adornment, color, opinion, artwork, or logos," and cannot be visible from a school, school bus stop, bus stop, sidewalk used by minors for school, or within 1,000 feet of a school, playground, or public park. The Lindsey's own a convenience store and are licensed to sell tobacco products in the state.
Holding: The local ban on outdoor tobacco advertising is preempted under the FCLAA.

Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183 (11th Cir. 2004)
Facts: Carolynn Watts Spain became addicted to smoking as a teenager in 1962, eventually passing from lung cancer in 1999. Her husband sued under Alabama's Wrongful Death Act for various causes of action, including negligence, wantonness, breach of implied warranty, and conspiracy.
Holding: Spain's negligent failure to warn claim and the conspiracy to fraudulently misrepresent the dangers of defendant's cigarettes are preempted. Spain's negligent and wanton design and manufacture claim and the implied warranty claim are not preempted.

Further Readings

Kevin R. J. Schroth, *Ten Years of the Tobacco Control Act in New York City*, J. LEGAL MEDICINE, 40: 321-333 (2020)

Tamara Lange, Michael Hoefges, and Kurt M. Ribisl. *Regulating Tobacco Product Advertising and Promotions in the Retail Environment: A Roadmap for States and Localities*, 43 J.L. MED. & ETHICS 878 (2015)